Ng Hoy Keong v Chua Choon Yang & Ors

HIGH COURT (SHAH ALAM) — ORIGINATING MOTION NO MT5-24–1196 OF 2008
HINSHAWATI SHARIFF JC
25 MARCH 2010

Companies and Corporations — Members' rights — Derivative action — Application for leave of court to defend company in derivative capacity — Non-compliance with required notice period — Whether court empowered to abridge or enlarge notice period — Whether plaintiff acting in good faith — Whether leave should be granted — Companies Act 1965 ss 181A, 181B(2) & 355(4)

The plaintiff and the first and second defendants were directors of the third defendant company with the plaintiff holding 50% of the issued and paid up capital of the third defendant company and the first defendant the remaining 50%. The plaintiff entered into joint venture partnership with one Patrick, who owned Satujaya Sdn Bhd, ('Satujaya') to take over and complete property developments with Satujaya to act as the main contractor. In 2005 the third defendant company entered into a project ('the project') which was financed by a loan obtained by the third defendant from EON Bank Bhd. Through subsequent events the plaintiff discovered that a payment of RM500,000 had been approved by Patrick and the first and second defendants to a director and shareholder of Satujaya, using a dormant company. The plaintiff thereafter applied for and obtained an inspection order whereby he had notice of all outgoing payments made by the third defendant and an injunction order to restrain Patrick and the defendants from operating certain banking accounts on behalf of the third defendant. Between March and April 2008 demand letters were sent to the third defendant company by Satujaya claiming the sum of RM5,814,704.57 as progress claims in respect of work done in the project. The plaintiff refused to pay the sum claimed as progress claims on the grounds that the claims were inflated. On 9 May 2008, Satujaya filed a suit ('the Satujaya suit') against the third defendant company for the sum of RM5,814,704.57 and judgment in default was recorded on 28 May 2008. Thereafter before execution proceedings against the third defendant could be heard the plaintiff filed the instant originating summons for, inter alia, an order that the plaintiff be granted leave to defend the Satujaya suit on behalf of the third defendant company and an order that the 30 days' notice to the directors of the third defendant pursuant to s 181B(2) of the Companies Act 1965 ('the Act') be abridged. All proceedings in the Satujaya suit were accordingly stayed pending the hearing and disposal of the instant suit. The plaintiff submitted

that although he had only given nine days' notice instead of the required 30 days' notice of his intention to defend the company, s 355(4) of the Act empowered the court to abridge or enlarge the period of giving such notice. The defendants, on the other hand, submitted that compliance with s 181B(2) of the Act was mandatory and that the court had no discretion to either waive, or abridge or enlarge the period of giving such notice. The defendants further submitted that the plaintiff had an ulterior motive in his pursuit of the derivative action and that he had withheld information which constituted bad faith. The High Court in this case had to consider whether it was empowered to abridge or enlarge the notice period under s 181A of the Act and whether the plaintiff was acting in good faith and in the interest of the third defendant to be granted leave under s 181B of the Act to defend the third defendant company.

Held, allowing the plaintiff's application with costs:

(1) It is clear that the intention of s 181B(2) is not to take the directors by surprise and, therefore the party wanting to obtain leave of court under s 181A must notify the directors of his intention to do so. Thus the underlying principle must be, that so long as no injustice has been caused to the party as a result of the non-compliance of the other party, then such non-compliance must be treated as a mere irregularity. Further, s 355(4) of the Act, which as it is found under the heading 'General' is intended by legislature for a general application of the Act, empowers the court to enlarge or abridge time for the doing of any act allowed or limited by the Act such as that provided by s 181B(2) (see paras 13–14).

(2) Based on the facts, without going into the merits of the substantial issues, the plaintiff had demonstrated a prima facie case on the complaint. The plaintiff had also shown sufficient evidence that he was acting in good faith in bringing this application. In addition, in view of the many disputed facts as disclosed in the affidavits filed by the plaintiff and the defendants, it was obvious that the issues could only be determined at a full trial. As such the plaintiff ought to be granted leave to defend the Satujaya suit (see paras 20–21).

[Bahasa Malaysia summary

Plaintif dan defendan pertama dan kedua adalah pengarah-pengarah syarikat defendan ketiga di mana plaintif memegang 50% saham berbayar syarikat defendan ketiga yang dikeluarkan dan defendan pertama memegang baki 50%. Plaintif memasuki perkongsian usahasama dengan seorang yang bernama Patrick, yang memiliki Satujaya Sdn Bhd ('Satujaya') untuk mengambil-alih dan melengkapkan pembangunan hartanah dengan Satujaya menjadi kontraktor utama. Pada tahun 2005 syarikat defendan ketiga terlibat dalam projek ('projek tersebut') yang mana telah dibiayai oleh pinjaman yang

diperolehi oleh defendan ketiga daripada EON Bank Bhd. Melalui kejadian-kejadian selepas itu plaintif mendapati bahawa bayaran RM500,000 telah diluluskan oleh Patrick dan defendan pertama dan kedua kepada seorang pengarah dan pemegang saham Satujaya, menggunakan syarikat yang tidak aktif. Plaintif selanjutnya memohon dan memperolehi perintah pemeriksaan di mana dia mendapat tahu mengenai semua bayaran-bayaran yang dibuat oleh defendan ketiga dan perintah injunksi bagi menghalang Patrick dan defendan-defendan daripada mengendalikan akaun-akaun perbankan tertentu bagi pihak defendan ketiga. Antara bulan Mac dan April 2008 surat-surat tuntutan diserahkan kepada syarikat defendan ketiga oleh Satujaya menuntut wang sejumlah RM5,814,704.57 sebagai bayaran berperingkat berkaitan dengan kerja-kerja yang dibuat dalam projek tersebut. Plaintif enggan membayar jumlah yang didakwa sebagai tuntutan berperingkat atas alasan bahawa tuntutan tersebut telah dinaikkan jumlahnya. Pada 9 Mei 2008, Satujaya memfailkan tindakan guaman ('guaman Satujaya tersebut') terhadap syarikat defendan ketiga bagi jumlah RM5,814,704.57 dan penghakiman ingkar telah dicatatkan pada 28 Mei 2008. Selanjutnya sebelum prosiding pelaksanaan terhadap defendan ketiga dapat didengar plaintif memfailkan saman pemula ini bagi, antara lain, satu perintah bahawa plaintif diberikan kebenaran untuk membela guaman Satujaya tersebut bagi pihak syarikat defendan ketiga dan perintah bahawa tempoh masa notis 30 hari kepada pengarah-pengarah defendan ketiga di bawah s 181B(2) Akta Syarikat 1965 ('Akta tersebut') dilanjutkan. Semua prosiding dalam guaman Satujaya tersebut ditangguhkan sementara menunggu perbicaraan dan penyelesian guaman sekarang ini. Plaintif menghujah bahawa walaupun dia hanya diberi notis sembilan hari daripada tempoh 30 hari yang dikehendaki bagi notis niatnya membela syarikat tersebut, s 355(4) Akta tersebut memberi kuasa kepada mahkamah untuk melanjutkan atau membesarkan tempoh notis sedemikian. Defendan-defendan, sebaliknya, menghujahkan bahawa pematuhan s 181B(2) Akta tersebut adalah mandatori dan mahkamah tidak mempunyai budi bicara sama ada untuk mengetepikan, melanjutkan atau membesarkan tempoh notis sedemikian. Defendan-defendan selanjutnya menghujah bahawa plaintif mempunyai motif tidak baik dalam tindakan derivatif tersebut dan yang dia telah menyembunyikan maklumat yang menjadikannya satu niat jahat. Mahkamah Tinggi dalam kes ini terpaksa menimbangkan sama ada ia diberikan kuasa untuk melanjutkan atau membesarkan tempoh notis di bawah s 181A Akta dan sama ada plaintif telah bertindak dengan jujur dan ia adalah demi kepentingan defendan ketiga bagi kebenaran diberikan di bawah s 181B Akta tersebut untuk membela syarikat defendan ketiga.

Diputuskan, membenarkan permohonan plaintif dengan kos:

(1) Adalah jelas bahawa niat s 181B(2) adalah agar pengarah-pengarah

tidak dikejutkan dan oleh itu pihak-pihak yang inginkan kebenaran mahkamah di bawah s 181A mesti memberitahu pengarah-pengarah tersebut niatnya berbuat demikian. Oleh itu prinsip dasarnya mestilah, bahawa selagi tiada ketidakadilan berlaku ke atas pihak tersebut akibat ketidakpatuhan pihak yang lain, maka ketakpatuhan sedemikian mesti dianggap sebagai hanya suatu luar aturan. Selanjutnya, s 355(4) Akta tersebut, yang didapati di bawah tajuk 'Umum' dimaksudkan oleh pembuat undang-undang untuk pemakaian am dalam Akta tersebut, memberi kuasa kepada mahkamah untuk menambah atau melanjutkan masa bagi melakukan apa-apa perbuatan yang dibenarkan atau dihadkan oleh Akta tersebut seperti yang diperuntukkan oleh s 181B(2) (lihat perenggan 13–14).

(2) Berdasarkan fakta-fakta, tanpa melihat merit isu-isu substansial, plaintif telah menunjukkan kes prima facie terhadap aduan tersebut. Plaintif juga telah menunjukkan bukti mencukupi bahawa dia bertindak dengan jujur dalam tindakan ini. Tambahan, memandangkan banyak fakta-fakta yang dipertikaikan telah didedahkan dalam afidavit-afidavit yang difailkan oleh plaintif dan defendan-defendan, jelas bahawa isu-isu tersebut hanya boleh diputuskan dalam perbicaraan penuh. Oleh itu plaintif sepatutnya diberikan kebenaran membela guaman Satujaya tersebut (lihat perenggan 20–21).]

Notes

For cases on derivative action, see 3(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 487–490.

Cases referred to

Agus Irawan v Toh Tech Chye & Ors [2002] 2 SLR 198, HC (refd)
Mohd Shuaib Ishak v Celcom (M) Bhd [2008] 5 MLJ 857, HC (refd)

Legislation referred to

Companies Act 1965 ss 181A, 181B(2), (4), 355(4)

Harvinderjit Singh (Kumar Partnership) for the plaintiff.
Moses Susayan (Raja Badrul, Ramli & Azizi) for the defendants.

Hinshawati Shariff JC:

[1] For convenience of references, the Kuala Lumpur Sessions Court Summons No S6–52–26026 of 2008 is hereinafter referred to as the Semangat Tinggi suit, the Shah Alam High Court MT2 22–744 of 2008 as the Satujaya suit and the originating summons which is before me as this suit. The third defendant in this suit is also the defendants in the Satujaya and the Semangat Tinggi suits.

A **[2]** The plaintiff is one of the three directors of the third defendant. He is the registered owner of 125,000 ordinary shares (representing 50% of its issued and paid-up capital) and the first defendant is the registered owner of the other 50%. The second defendant is the third director. It is of relevance to note at this stage that the third defendant was the vehicle set up to facilitate
B a joint venture partnership between the plaintiff and a certain Patrick Wong Ha ('Patrick') whereby the plaintiff would, inter alia, use his land broker connections to secure property development undertaken by the third defendant whilst Patrick would contribute his knowledge and experience in the construction and development industry. Satujaya Sdn Bhd which is
C owned by Patrick would act as the main contractor in the project.

[3] Initially the plaintiff and Patrick contributed equally towards the issued paid up capital of the third defendant but Patrick's stake was held by his wife as his nominee. Subsequently these shares were transferred by her to the first
D defendant. This was apparently done with the agreement of the plaintiff.

[4] Subsequent events show that in 2005, the third defendant was given the opportunity to take over and complete a commercial property development
E in Sungei Buloh ('the project'). The undisputed facts as far as the project was concerned were as follows — the acquisition of the twenty acres of land for the project which had been subdivided into eighty-nine parcels of industrial lots, were equally financed by the plaintiff and Patrick; that Satujaya Sdn Bhd was appointed as the main contractor for the project and the project was
F financed by loan obtained by the third defendant from EON Bank Bhd.

[5] Further events began to unfold when at the end of September 2007, the plaintiff with the consent of Patrick, the first and second defendants, enlisted the help of the plaintiff's wife to examine the books and statements of
G accounts of the third defendant. As a result of this exercise the plaintiff alleged that he had discovered a payment of RM500,000 had been approved by Patrick and/or the first defendant as well as the second defendant to a company called Care Folk Sdn Bhd ('CF'). Five payment vouchers showing proof of this allegation were produced and marked as exhs 'NHK18',
H 'NHK19', 'NHK20', 'NHK21' and 'NHK22' in encl 2. CF it was said is a dormant company and has no business activity. The plaintiff further alleged that subsequent investigations then showed that this money had been paid to one Siew Kee, a director and shareholder of Satujaya Sdn Bhd.

I **[6]** In November 2007, the plaintiff filed Originating Petition No D4–26–129 of 2007 at the Kuala Lumpur High Court ('the oppression petition'). An ad-interim order was granted whereby the first defendant, the second defendant and Patrick were required to put the plaintiff on notice of all outgoing payments to be made by the third defendant. A subsequent order

was then made allowing the plaintiff to inspect all documents, books and accounts of the third defendant ('the inspection order') and an interlocutory injunction to, inter alia, restrain Patrick, the first defendant and the second defendant from operating and/or carrying on any business or transaction relating to three current accounts and/or opening any other banking accounts on behalf of third defendant without the approval of the plaintiff ('the injunction order').

[7] The rift between the parties deepened when, after the grant of the inspection and injunction orders, demand letters dated 7 March 2008, 25 March 2008 and 15 April 2008 were sent to the third defendant by Satujaya Sdn Bhd claiming the sum of RM5,814,704.57 in respect of progress claims Nos 5–9 submitted for works done in the project. The plaintiff did not agree to pay these amounts as he was of the view that based on documentary evidence, there was every reason to believe that the amounts had been inflated.

[8] The Satujaya suit was filed on 9 May 2008 and judgment in default was recorded on 28 May 2008. A garnishee order to show cause was issued to the third defendant but before this is heard, the plaintiff had filed this suit. On 16 September 2008 after hearing submissions from learned counsel, I granted a stay of all proceedings in the Satujaya suit pending the hearing and disposal of encl 1 in this suit.

[9] By way of encl 1, the reliefs that the paintiff seeks are, inter alia, as follows:

(a) an order that the 30 days' notice to the directors of the third defendant pursuant to sub-s 181B(2) of the Companies Act 1965, be abridged;

(b) an order that the plaintiff be granted leave to defend the Satujaya suit and/or counterclaim or issue fresh proceedings, on behalf of the third defendant in relation thereto; and

(c) an order that the first and second defendants provide assistance and information to the plaintiff including the inspection of all books and records of the third defendant.

[10] As was admitted by Mr Harvinderjit Singh, learned counsel for the plaintiff, the plaintiff had given only nine days notice to the first and second defendants, thereby rendering this notice not in compliance with sub-s 181B(2) of the Companies Act 1965 (Act 125). For completeness, the said sub-s 181B(2) is reproduced as follows:

181B Leave of Court

(1) An application for leave of the Court under section 18A shall be made by Originating Summons and no appearance need to be entered;

(2) The complainant shall give thirty days notice in writing to the directors of his intention to apply for the leave of Court under section 181A;

(3) Where leave has been granted pursuant to an application under section 181A, the complainant shall initiate proceedings in Court within thirty days from the grant of leave;

(4) In deciding whether or not leave shall be granted the Court shall take into account whether —

(a) The complainant is acting in good faith;

(b) It appears prima facie to be in the best interest of the company that the application for leave be granted.

[11] Mr Harvinderjit Singh submitted that sub-s 181B(2) must be read with sub-s 355(4) of the same Act, for reading otherwise would, he said, lead to an ambiguity. Subsection 355(4) is contained in Part XII under the heading 'GENERAL' and it is in relation to 'ENFORCEMENT OF ACT'. The said subsection specifically empowers the court to '... enlarge or abridge any time for doing any act or taking any proceeding allowed or limited by this Act upon such terms, if any, as the justice of the case may require and any such enlargement may be ordered although the application for the same is not made until after the time originally allowed or limited'.

[12] Learned counsel for the defendants, Mr Moses Susayan on the other hand, submitted that compliance with sub-s 181B(2) is mandatory and the court has no discretion to either waive or abridge or enlarge the period of giving such notice. Mr Moses said a comparison must be drawn between sub-s 181B(2) with similar provisions found in the Hong Kong, Singapore and the Canadian legislations wherein they have specific provisions to either abridge the period or dispense with the notice altogether.

[13] I accept Mr Moses's submission on the comparison between our own sub-s 181B(2) with those found in the countries mentioned. I have, however, come to a different conclusion on that point. In my view, the fact that the Hong Kong, Singapore and Canadian legislation have specific provisions empowering the court to grant abridgment of time or dispensation of notice appear to reiterate the point that an application need not necessarily be shut out from obtaining this relief simply because it had not complied with the

time specified for the giving of such notice. It is clear that the intention of sub-s 181B(2) is not to take the directors by surprise and, therefore, the party wanting to obtain leave of court under s 181A must notify the directors of his intention to do so. The underlying principle must in my view be, that so long as no injustice has been caused to the party as a result of the non-compliance of the other party, then such non-compliance must be treated as a mere irregularity.

[14] In addition, it is also my view that sub-s 355(4) does provide a way out of the predicament as the one faced by the plaintiff here. As I had mentioned earlier, this provision is found under the heading 'GENERAL' and that fact must be given importance for it is obvious that it was the intention of the legislature to incorporate that provision for a general application of the Act. In fact, this conclusion is very obvious from the wordings of sub-s 355(4) itself. I do not think I need say more on this issue except to say that I am in agreement with the submission of Mr Harvinderjit Singh that sub-s 355(4) empowers the court to enlarge or abridge time for the doing of any act allowed or limited by the Act such as that provided by sub-s 181B(2). In passing, I would add that perhaps it is because there is already a provision in the form of sub-s 355(4) that the drafters in coming up with the new sub-s 181B(2) did not think it necessary to have a specific provision for either the abridgement or enlargement of time which is specific to sub-s 181B(2).

[15] I now come to the second part of the application, which is, whether or not leave should be granted under s 181B(2) of the same Act. This section is to the following effect:

> (4) In deciding whether or not leave shall be granted the Court shall take into account whether —
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> (a) the complainant is acting in good faith; and
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> (b) it appears prima facie to be in the interest of the company that the application for leave be granted.

[16] The plaintiff is asking to be allowed to defend on behalf of the third defendant in the Satujaya suit. Satujaya is claiming for the sum of RM5,814,704.57 purportedly due and owing under progress claims Nos 5–9. At para 47 in his affidavit affirmed on 5 June 2008 (encl 2), the plaintiff had averred that upon being granted the inspection order and thereafter after having inspected Satujaya's progress claims Nos 1–4, he had discovered that progress claim No 4 contains figures much higher and inconsistent with progress claims Nos 1, 2 and 3 in respect of the same scope of work. The

plaintiff also discovered that Patrick, along with the first and second defendants had approved and made payments totaling RM6,888,357.27 on all those claims. At para 48 of the same affidavit, the plaintiff also averred that the consultant architect has confirmed that they had not been given nor had they ever certified any of the said progress claims although it was purportedly claimed to be so by Satujaya. A copy of the letter dated 3 January 2008 from the consultant architect was shown as exh 'NHK3a' in the affidavit.

[17] The defendants, as was to be expected, contended that there was no inflation of the progress claims. They said that Satujaya had been appointed as the turnkey contractor for the project (para 19 of encl 8) and the amounts to be paid to Satujaya was in accordance with the agreed contract price at RM17,613,645. It was also contended by the defendants that the third defendant would issue contractor payment requests and recommendation and the amounts would be paid to Satujaya without certification by the project consultant.

[18] Arising from the position taken by the defendant, the plaintiff disclaimed that there is proof that Satujaya had been appointed as the turnkey contractor for the project. The plaintiff relied on, inter alia, the following grounds to show that the allegations of the defendants are afterthoughts:

(a) the defendants have failed to produce any evidence of a Board of Directors Resolution formally appointing Satujaya as the turnkey contractor;

(b) the turnkey agreement and supplementary agreement were stamped on 2 May 2008 and not at the material time which was on 15 March 2006;

(c) the plaintiff is not a party to this agreement;

(d) there was never any contract price; and

(e) the first time these agreements came to light were in the defendant's affidavit affirmed on 9 December 2008 (encl 10).

[19] Learned counsel for the plaintiff and the defendants have conceded that 'good faith' and 'best interest' of the company as required under s 181B(4) are indeed intertwined. Learned counsel for the defendants, however, went on further to say that over and above that fact, the court must be satisfied that the plaintiff has no ulterior motive in its pursuit of the derivation action. Learned counsel relied on the case of *Agus Irawan v Toh Tech Chye & Ors* [2002] 2 SLR 198 in support of this proposition. The acts

complained of which according to learned counsel, constituted bad faith were one, that the plaintiff did not disclose in his affidavit the fact of the voluntary liquidation of the company and two, that his own company, Hoy Keong Engineering Sdn Bhd had benefited from the lump sum contract as a result of the payments on Satujaya's progress claims Nos 1–4.

[20] I would like at this stage, refer to the judgment of Ramly Ali J (as His Lordship then was) in the case of *Mohd Shuaib Ishak v Celcom (M) Bhd* [2008] 5 MLJ 857 as the starting point in determining this application for leave under s 181A of the Companies Act. His Lordship said:

> (113) In an action for leave under s 181A of the Act, a complaint had to show that he was acting in good faith, and that it was in the prima facie in the interests of the company that the action be brought. The complainant had to demonstrate that there was a reasonable basis for the complaint and that the proposed action was legitimate and arguable, in that it had a reasonable semblance of merit. It should also be remembered that this is an application for leave. The plaintiff is required to prove his case on merits.
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> (114) At the leave stage, which is the threshold stage, the court is not to go into substantial issues on merits. All the applicant has to do is to follow the threshold requirement by showing a prima facie case and that the application is not vexatious and frivolous. There must be some substance in the grounds supporting the application.
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> (115) The court should grant leave if it is clear that there is a point for further investigation on a full inter partes basis with all such evidence on the facts and all such arguments as is necessary on the law.

[21] Based on the facts that have been presented in this case, I am satisfied that the plaintiff had demonstrated a prima facie case on the complaint. The plaintiff has also shown sufficient evidence that he is acting in good faith in bringing this application. In view of the many disputed facts as disclosed in the affidavits filed by the plaintiff and the defendants, it is obvious that the issues can only be determined at a full trial. In order to do, I would grant the plaintiff leave to defend in the Satujaya suit.

[22] I will have to also say that although in his submission, learned counsel for the plaintiff had submitted for leave to defend in the Semangat Tinggi suit, I have not allowed it for the reason that this was not prayed for in the originating summons.

[23] Prayers (1), (2), (3), (4) and (6) of encl 1 are, accordingly, allowed with costs.

Plaintiff's application allowed with costs.

Reported by Kohila Nesan